91-1763

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

OTTAWAY NEWSPAPERS, INC., D/B/A
ASHLAND PUBLISHING COMPANY, and
P. R. BAILEY,

Petitioners,

vs.

DAVID OSBORNE, KENCO ASSOCIATES,
INC. and ROGER W. HALL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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QUESTIONS PRESENTED

The questions presented by these petitioners are:

(a) Whether the Kentucky Court of Appeals unconstitutionally varied the limits of free speech from state to state by applying an unconstitutionally restrictive test to an engineer and an attorney employed by a local government agency and thereby determined that they were private persons and, therefore, the New York Times malice standard was not applicable to them.

(b) Whether the Kentucky Court of Appeals has unconstitutionally created strict civil liability for the publication of the truth, and thereby created a civil action for seditious libel.

(c) Whether the Kentucky appellate courts unconstitutionally failed to conduct a de novo review of the trial court record as a whole, as mandated by the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner, Ottaway Newspapers, Inc., is publisher of The Daily Independent, a daily newspaper of general circulation serving, among other areas, eastern Kentucky and southern Ohio, including Boyd and Lawrence counties, Kentucky, and Lawrence County, Ohio.

Petitioner, Paul Richard Bailey, was formerly employed by the petitioner, Ottaway Newspapers, Inc., as a newspaper reporter. He now lives in Bradenton, Florida.

Respondent, Roger W. Hall, was, at the relevant times, counsel to Big Sandy Water District, an agency of Boyd County, Kentucky.

Respondent, David Osborne, is President of Kenco Associates, Inc., the counsulting engineering firm which planned and constructed the Big Sandy Water District.

Respondent, Kenco Associates, Inc., is an engineering firm wholly owned by respondent Osborne which conducts consulting work for the Big Sandy Water District.

RULE 29.1 STATEMENT

The petitioner, Ottaway Newspapers, Inc., is wholly owned by Dow Jones, Inc.

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OPINIONS AND PRECEEDINGS BELOW

Petitioners' appendix contains the relevant documents from the proceedings below:

1. Trial Court's Order and Findings of Fact and Conclusions of Law granting Partial Summary Judgment to Petitioners: app. at 9A.

2. Trial Court's Findings of Fact, Conclusions of Law

and Judgment granting Summary Judgment to Petitioners: app. at 14A.

3. Opinion of the Kentucky Court of Appeals, 38 K.L.S. 7, pg. 8 (7/10/91): app. at 1A.

4. Order of the Kentucky Court of Appeals denying rehearing: app. at 19A.

5. Order of the Kentucky Supreme Court denying discretionary review, and ordering the opinion of the Court of Appeals not to be published: app. at 20A.

JURISDICTIONAL STATEMENT

The entry date of the Order of the Kentucky Supreme Court denying discretionary review of the opinion of the Kentucky Court of Appeals is February 5, 1992. The Kentucky Court of Appeals entered its opinion on June 21, 1991; the Court of Appeals denied the Petition for Rehearing on September 20, 1991. The appellate decision resulted from an appeal of a Kentucky circuit court decision.

Jurisdiction is conferred upon this Court to review, by writ of certiorari, the appellate decision in question by 28 U.S.C. §1257 (3).

This Court should grant the writ of certiorari under the authority of Rule 10.1 (c) of this Honorable Court.

The Kentucky appellate court decision is final on the issue of the First Amendment privileges raised by the petitioners before the trial court and not subject to further review in the

state courts of Kentucky.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. amend. XIV, §1, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

KY Const. §8, provides that "Printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." Const. 1850, Art 13, §9.

KRS 74.010 provides that "Subject to the provisions of KRS 74.012 a fiscal court may create a water district in accordance with the procedures of KRS 65.810."

KRS 74.030 provides that "The county attorney shall act as counsel to the water commission, except that the

commission may, subject to approval of the court, employ counsel whose compensation shall be paid from water district funds."

STATEMENT OF THE CASE

In the trial court, petitioners received summary judgment, in this defamation action, by application of their First Amendment privilege claims and their defense of truth: app. at 14A. The Kentucky Court of Appeals reversed and remanded: app. at 1A. The Kentucky Supreme Court denied discretionary review: app. at 20A.

Respondents' claims all arise from the publication of an investigative series, between April 8 and April 15, 1985, in The Daily Independent, a daily newspaper of general circulation, published in Ashland, Kentucky, by Ottaway Newspapers, Inc.

The series reviews the history of the Big Sandy Water District (hereinafter BSWD) from its inception, as an idea, in the mid-1970s, through the period of funding and final construction in 1984; in Kentucky, water districts are statutorily created government agencies: see KRS 74.010. The content of the series is based principally on the official records of the Kentucky Public Service Commission, the BSWD, the office of the Boyd County Clerk, and a report of the Inspector General of the United States Department of Agriculture (USDA).

The idea for the series arose when a copy of the report of the Inspector General of the USDA, very critical of respondents and the FIVCO Area Development District, was

delivered to the offices of The Daily Independent.

To a great degree, the series was repetitious of previous coverage in the The Daily Independent, the Huntington Herald-Dispatch and other local newspapers during the period 1977 to 1984.

Statement Of The Case As To Respondent, Roger Hall:

With regard to respondent, Roger Hall, the trial court found that he is a "public official" as first defined in Rosenblatt v. Baer, 383 U.S. 75 (1966): app. at 11A.

The status of respondent Hall as a public official was raised initially in petitioners' answer and again in petitioners' brief in support of its motion for summary judgment. Petitioners also raised the issue that the articles complained of were true, or subtantially true, with regard to respondent Hall.

The trial court found the following undisputed facts with regard to respondent Hall: he has been counsel to the BSWD since its beginning in 1977; all parties agreed as to his duties, which duties were clearly defined in the record; he admitted that he exercised substantial discretion in the conduct of these duties; he received media coverage by virtue of his position as counsel to the water district, and by virtue of his other, simultaneous, employment with other government agencies, therefore, he had access to the press and his constant attendance at the public meetings of the BSWD indicated that he had access to a public forum for rebuttal; the record indicated that he voluntarily accepted his position with BSWD and was aware that it would receive media coverage; he admitted that the alleged defamation

concerned his performance of duties as counsel to the BSWD. Therefore, as a matter of law, respondent Hall appeared to the public to have substantial control for the conduct of government affairs and was, therefore, a "public official" within the meaning of Rosenblatt.

Simultaneously, as he performed his duties as counsel to BSWD, respondent Hall was listed as a director of Sandy Valley Development, Inc., a company developing lots in the area of Boyd County to be served by the BSWD. It was undisputed that Hall owned a lot in the sudivision which would be benefited by the extension of the water lines proposed by the BSWD. Further, Hall admitted that he received this lot as a portion of his fee for legal services to Sandy Valley Development, Inc. The president of Sandy Valley Development, Inc. was David Salisbury, chairman of FIVCO Area Development, Inc., the government agency promoting the development of BSWD. The series questioned the propriety of Hall serving as an attorney for a public agency while serving as director of a company which would benefit by the decisions of that agency, as well as benefit personally by the construction of public improvements to his private property.

Hall testified that those portions of the series which he considered defamatory concerned his performance of duties as counsel to the BSWD; those duties included the following: service as general counsel; acting as local counsel for the purpose of lobbying for local funding; required attendance at the monthly public meetings of the district commissioners; representation in all legal proceedings, to include litigation, not merely condemnation proceedings; representation before the Kentucky Public Service Commission; representation of the BSWD during expansion into adjacent counties; and

assistance to bond counsel for the BSWD.

The official minutes of the BSWD, which are a portion of the trial court record, disclose that respondent Hall was often called upon by the district commissioners to respond, in public, to inquiries and complaints during the district's public meetings; the media was constantly in attendance at these meetings. The minutes of the BSWD meetings disclosed that, during the seven-year period described in the series, respondent Hall attended fifty-seven of the eighty-one public meetings of the BSWD.

In Kentucky, the duties of counsel to a local water district are normally performed by the elected county attorney, without cost to the water district: see KRS 74.030.

Statement Of The Case As To Respondents, David Osborne And Kenco Associates, Inc.:

Respondent, David Osborne, is the sole owner, president and only director of Kenco Associates, Inc., a firm of consulting engineers. In recent years, most of Osborne's and Kenco's work has been public projects. The series was critical of Osborne's work on the BSWD and critical of the fact that his real property increased in value by virtue of his work on this public project. Osborne's firm was severely criticized by the report of the Inspector General of the USDA which, as stated above, was the initiating information that led The Daily Independent to conduct the investigation and ultimately publish the results of that investigation in the series.

Petitioners initially raised the issues of the status of respondents, Osborne and Kenco, as public figures in their

answer and brief in support of their motion for summary judgment. The truth of the articles with regard to Osborne and Kenco was also raised.

The trial court found that Osborne and Kenco were "limited purpose public figures" as defined in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and McDowell v. Paiewonsky, 769 F.2d 942 (3d Cir. 1985): app. at 10A; in so doing, the court applied the tests enumerated in those cases and found, as an undisputed matter of fact and, therefore, as a matter of law, that Osborne and Kenco had access to the channels of effective communication, had assumed the risk of media scrutiny of their work for the BSWD and other public works projects, and the BSWD projects involved several "public controversies" in which Osborne and his firm of consulting engineers were leading participants. The trial court's decision on this issue was based on undisputed facts.

Osborne admitted that, in his capacity as president of Kenco Associates, Inc., he had long experience with the media. He had continuing access to the media by virtue of his attendance at the public meetings of the BSWD wherein he used the forum provided by these public meetings to rebut complaints from the public, and the Boyd County Fiscal Court, or to rebut information appearing in the local newspapers. In all, Osborne, or another Kenco representative, attended sixty-nine of the eighty-one meetings held during the period described by the series; Osborne was almost exclusively in attendance from 1977 through 1980.

In his deposition, Osborne described his leadership in the creation of the water district, a controversial public project from its beginning.

Throughout the history of the BSWD, there have been at least eight "public controversies" (all of which were described in depth in "the series") in which Osborne, either as an individual leader or through his firm, Kenco Associates, Inc., involved himself. Therefore, the trial court found, as a matter of undisputed fact, and thus, as a matter of law, that Osborne and his wholly owned consulting engineering firm, Kenco Associates, Inc., met or exceeded all the McDowell and Gertz characteristics for classification as "limited purpose public figures." They had access to the channels of effective communication; they consistently assumed the risk of media scrutiny and, in fact, received that scrutiny, and became leading participants in many public controversies.

The trial court not only determined that respondent Hall was a "public official" and respondents, Osborne and Kenco, were "limited purpose public figures", but also granted petitioners' motion for summary judgment. The trial court, without regard to the status of the plaintiffs, found that the publications in question were substantially true: app. at 16A.

Respondents, Hall, Osborne and Kenco, appealed the decision of the trial court. Petitioners restated the issues concerning the status of the respondents as public official and public figures, respectively, in their initial brief submitted to the Kentucky Court of Appeals. The substantial truth of the articles was also restated.

The Court of Appeals ruled that respondent Hall was not a "public official" as defined in Rosenblatt: app. at 5A. The court also ruled that respondents, Osborne and Kenco, were not "limited purpose public figures": app. at 6A. They further ruled that, even though "some" of the statements were substantially true, the issue should be submitted to a jury:

app. at 7A.

Petitioners then filed a petition for rehearing with the Court of Appeals and again raised all previous issues in their petition. At this point in the proceedings, the first opportunity to do so, the petitioners also questioned whether the Court of Appeals had conducted a de novo review as required by Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 485 (1984) and Harte-Hanks Comunications, Inc. v. Connaughton, 491 U.S. 657 (1989).

The Kentucky Court of Appeals denied a rehearing: app. at 19A. Petitioners then filed a motion for discretionary review with the Kentucky Supreme Court. Again, the status of respondent Hall and respondents, Osborne and Kenco, were raised, along with the applicable malice standard. The substantial truth of the articles was also addressed in petitioners' brief, in addition to the issue of whether the Court of Appeals had conducted the required de novo review.

The Kentucky Supreme Court denied petitioners' motion for discretionary review and ordered the opinion of the Kentucky Court of Appeals not to be published: app. at 20A.

ARGUMENTS AND REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

WHETHER THE KENTUCKY COURT OF APPEALS VARIED THE LIMITS OF FREE SPEECH FROM STATE TO STATE BY APPLYING AN UNCONSTITUTIONALLY RESTRICTIVE TEST TO AN ENGINEER AND AN ATTORNEY EMPLOYED BY A LOCAL GOVERNMENT AGENCY AND THEREBY DETERMINED THAT THEY WERE PRIVATE PERSONS AND, THEREFORE, THE NEW YORK TIMES MALICE STANDARD WAS NOT APPLICABLE TO THEM.

The Court of Appeals of Kentucky has segregated itself from the remainder of the state courts that have considered the issue and has determined that a private attorney employed by a local government agency is not a "public official", nor is the engineer who regularly conducts consulting engineering services for the same public agency a "limited purpose public figure". In so doing, the Kentucky Court of Appeals indicated that this question was an issue of first impression in Kentucky. In its opinion, the Court of Appeals stated: "There is little law in Kentucky concerning who is a public official for purposes of applying the actual malice standard in order to recover from a media defendant": app. at 4A.

In determining that the public official criteria established by this Court in Rosenblatt and Gertz did not apply to attorney Hall, the Kentucky Court of Appeals found the following:

Hall was hired to do contract work by the BSWD and not employed on a full-time basis; Hall had no substantial authority or control over the BSWD; and Hall's consistent attendance at the public meetings of the BSWD and simultaneous media coverage of his other public activities did not indicate that he had "significantly greater access to the media", and, his public position as counsel to the BSWD did not invite public scrutiny apart from the person holding it: app. at 5A-6A.

In so holding, the Kentucky Court of Appeals addressed an issue which has been exclusively a question of federal constitutional law since New York Times v. Sullivan, 376 U.S. 254 (1964), and answered the question in direct opposition to the great weight of authority from other states and, thus, unconstitutionally created "a constitutional limit on free expression which varies with state lines": see Rosenblatt, 383 U.S. at 675.

Since New York Times, the states have not been free to establish their own standards for a "public official" as a libel plaintiff, rather, this Court established the rule in New York Times that such a plaintiff must prove actual malice, and, importantly, this First Amendment standard was applicable to the states by virtue of the Fourteenth Amendment.

The entire purpose behind the New York Times ruling and its progeny, Rosenblatt and Gertz, was to establish a uniform standard throughout the nation. Unlike other states which have considered the issue, the Court of Appeals of Kentucky has determined that, in order to qualify as a "public official", a libel plaintiff must be a full-time government employee, must have control over the agency of government which employs him, and even though such a plaintiff consistently

attends the public meetings of his agency or employer, such attendance does not indicate that he has access to the media and, thus, access to the effective means of communication for purposes of rebuttal. Thus, the Kentucky Court of Appeals has applied a more restrictive limit on free expression within the Commonwealth and varied the standard in the Commonwealth from that established by other state appellate courts which have considered the issue since this Honorable Court decided Rosenblatt and Gertz.

In the other states that have considered the issue, the high courts looked to the nature of the plaintiff's employment and the scope of his duties, rather than whether or not the attorney was a full or part-time employee of government: see Rhoda v. Harvey, 6 Media L. Rep. (BNA) 2525, 2526 (Me. Super. Ct. 1981); Weingarten v. Block, 102 Cal. App. 3d 140, 162 Cal. Rptr. 701, 709-710 (Cal. Ct. App. 1980); Frink v. McEldowney, 29 N.Y.2d 720, 275 N.E.2d 337 (N.Y. 1971); Tague v. Citizens for Law and Order, Inc., 75 Cal. App. 3d Supp. 24, 142 Cal. Rptr. 689 (Cal. App. Dep't Super. Ct. 1977); Tunnell v. Edwardsville Intelligencer, Inc., 9 Ill. App. 2d 1, 241 N.E.2d 28 (Ill. App. Ct. 1968). Further, these courts determined that the nature of the duties performed by these attorneys, similar to respondent Hall's, invited public scrutiny separate and apart from the person holding the position.

Thus, four states which have applied the Rosenblatt criteria to libel plaintiffs, such as attorney Hall, have reached different conclusions in similar factual situations.

Unlike these other four states, the Kentucky Court of Appeals misapplied the Rosenblatt public official criteria to plaintiff Hall by distinguishing his public position based on the fact that it was not a full-time public position. This is a

misapplication of Rosenblatt: see Frink, 275 N.E.2d at 337, and Bishop v. Wometco Enters., Inc., 235 So. 2d 759 (Fla. Dist. Ct. App. 1970).

Further, two other states have determined that attorneys with duties similar to those of respondent Hall, who attend the public meetings of their agencies, are "public officials" by virtue of the access to the media provided by this attendance, thus, giving them an effective opportunity for rebuttal: see Tague, 142 Cal. Rptr. at 692-693, and Tunnell, 241 N.E.2d at 37; and see Gertz, 418 U.S. at 344.

Although the trial court record clearly indicated attorney Hall's attendance at meetings of the BSWD during the period covered by the series, the Kentucky Court of Appeals rejected this undisputed evidence as probative of the "access to media" criteria for "public official" status, thus, drawing a different conclusion for Kentucky from that of the highest courts in California and Illinois which have considered the issue.

Further, the Court of Appeals further restricted the "public official" category in the Commonwealth and created an even greater diversity among the states, on this important First Amendment issue, by determining that, in Kentucky, a "public official" must have control over the public agency which employs him; all other states which have considered this question correctly applied the Rosenblatt criteria of "appear to the public to have substantial responsibility for or control over the conduct of government affairs....": see Rosenblatt, 383 U.S. at 85; not control of the government agency which employs them: Weingarten, 162 Cal. Rptr. at 709; Tague, 142 Cal. Rptr. at 693; Tunnell, 241 N.E.2d at 37; Rhoda, 6 Media L. Rep. at 2526.

Thus, the Kentucky Court of Appeals has distinguished the First Amendment "public official" privilege in Kentucky by applying it only to those public officials who are employed full-time by their agencies and who, in fact, control those agencies which employ them, unlike any of the states which have considered a similar question since this Court's ruling in Rosenblatt and Gertz.

Further, the Kentucky Court of Appeals applied the same unconstitutionally restrictive test to the BSWD's engineers, although the Court did not deny the unrebutted evidence of Osborne's and Kenco's consistent attendance at the public meetings of the BSWD, the Court merely stated that there was "no evidence" that Osborne or Kenco Associates had "access to the media": app. at 6A. Thus, rejecting the analysis given by the state appellate authorities referenced above with regard to respondent Hall, i.e., that consistent attendance at public meetings, where the media is present, qualifies for the "effective means of rebuttal" characteristic found in Gertz, 418 U.S. at 344.

Importantly, with regard to respondents, Osborne and Kenco Associates, in order to be consistent with its unconstitutionally restrictive decision as to respondent Hall, the Court of Appeals was forced to address, only indirectly, the other unrebutted evidence of "limited purpose public figure" status as to Osborne and Kenco Associates. Although directly on point, the Kentucky Court of Appeals did not address the appellate court's analysis in McDowell, a case wherein an architect engineer with a long history of work on public projects was found to be a "limited purpose public figure" since he had access to the media for rebuttal, assumed the risk of media coverage, and the work involved a public controversy. McDowell, 769 F.2d at 947-48.

This failure of the Court of Appeals to recognize the unrebutted evidence with regard to each of these elements, or to ignore the same, is consistent with an intent to restrict First Amendment privileges in Kentucky, without regard to the national uniformity required by the Fourteenth Amendment.

Therefore, this Court must grant this petition in order to insure Kentucky publishers are beneficiaries of the same First Amendment privileges available to publishers in other states.

II

WHETHER THE KENTUCKY COURT OF APPEALS HAS UNCONSTITUTIONALLY CREATED STRICT CIVIL LIABILITY FOR THE PUBLICATION OF THE TRUTH AND THEREBY CREATED A CIVIL ACTION FOR SEDITIOUS LIBEL.

The Kentucky Court of Appeals, by remanding this case, has imposed the risk of civil liability upon the petitioners, notwithstanding the fact that they ruled in their opinion that "some" of the alleged defamatory statements are true: app. at 7A.

It has long been settled that the truth of an alleged defamatory statement of fact is an absolute defense thereto: New York Times, 376 U.S. at 267; Garrison v. Louisiana, 379 U.S. 64, 75 (1965).

Furthermore, following Gertz, the states are free to establish any standard of liability for defamation as long as they do not adopt "strict liability" or liability without fault.

Gertz, 418 U.S. at 347.

Thus, these petitioners must now risk strict civil liability for the publication of the truth. It is undoubted that the series as a whole concerns matters of great public interest and is highly critical of local government. At only one time in our nation's past has truthful criticism of government led to liability, either civil or criminal: Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86 (Ill. 1923). Further, as Mr. Justice Stewart stated in Rosenblatt: "The Constitution does not tolerate actions of libel on government. State defamation laws, therefore, whether civil or criminal, cannot constitutionally be converted into laws against seditious libel." Rosenblatt, 383 U.S. at 679. (emphasis added)

The practical effect of the Court of Appeals' decision, app. at 1A, is to impose a civil sanction upon these petitioners for the publication of the truth, critical of local government; in effect, creating strict civil liability for a seditious libel.

Therefore, this Honorable Court should grant the petition.

III

WHETHER THE APPELLATE COURTS OF KENTUCKY UNCONSTITUTIONALLY FAILED TO CONDUCT A DE NOVO REVIEW OF THE TRIAL COURT RECORD AS A WHOLE.

In order to reach its result restricting the Rosenblatt and Gertz public official and public figure criteria, the Kentucky Court of Appeals was forced to ignore its duty to review the

trial court record as a whole; the failure of the Supreme Court of Kentucky to grant discretionary review in a case where a First Amendment privilege is squarely at issue compounds the error of the Court of Appeals and deprived these petitioners of their constitutionally mandated right to have an appellate court make an independent examination of the whole record to insure that the judgment of the Court of Appeals did not constitute a forbidden intrusion on the field of free expression. This is an issue of federal constitutional law; the Kentucky appellate courts are not free to relinquish this duty concurrent with an opinion impermissibly restricting the scope of free expression. Bose Corp., 466 U.S. at 509-510; Harte -Hanks Communications, Inc., 491 U.S. at 2696-97.

It is blatantly obvious that the Kentucky Court of Appeals ignored the trial court record, since, in the case of both engineer Osborne, his firm Kenco Associates, and attorney Hall, the Court of Appeals ruled that there was no evidence that either plaintiff enjoyed significantly greater access to the media by virtue of their public positions, when, in fact, the trial court had found the contrary, as to each plaintiff, as an undisputed matter of fact. Indeed, an opposite conclusion on the part of the trial court was simply impossible since the minutes of the public meetings of the BSWD were attached as an exhibit to petitioners' motion for summary judgment, these minutes show respondents' consistent attendance at the district's public meetings. Respondent Osborne admitted he was experienced in dealing with the media and respondent Hall admitted that he expected media coverage of his activities as counsel to the BSWD. Importantly, in the trial court, respondents offered no evidence to the contrary.

Thus, for the Court of Appeals to rule that there was no

evidence of respondents' significantly greater access to the media, a fortiori, they had to ignore their duty to conduct a de novo review of the record as a whole. More importantly, the opinion of the Court of Appeals stripping these petitioners of their First Amendment privilege, imposed upon the Supreme Court of Kentucky the duty to grant discretionary review and conduct a review de novo of the entire record, a duty which the Kentucky Supreme Court refused to undertake.

Therefore, this Honorable Court must grant this petition in order to insure that these petitioners receive the de novo review of the record as a whole to which they are entitled as a matter of federal constitutional law.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request this Honorable Court to grant the petition for writ of certiorari in this case in order to insure that the privileges provided by the First Amendment are available to publishers in the Commonwealth of Kentucky; to remove the petitioners' risk of civil liability for publication of the truth; and, to provide the petitioners their constitutionally mandated right to a de novo review of the trial record as a whole.

DATED: April 30, 1992,

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APPENDIX

RENDERED: June 21, 1991; 3:00 p.m.
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Commonwealth of Kentucky
Court Of Appeals

No. 89-CA-2228-MR

DAVID OSBORNE, KENCO ASSOCIATES, INC. and ROGER HALL — APPELLANTS

V.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE STEPHEN FRAZIER, JUDGE
ACTION NO. 85-CI-718

OTTAWAY NEWSPAPERS, INC., d/b/a ASHLAND PUBLISHING COMPANY, and P. R. BAILEY — APPELLEES

REVERSING AND REMANDING

BEFORE: HOWARD[1], McDONALD and WILHOIT, Judges

McDONALD, JUDGE. In October, 1985, the appellant, Roger Hall, filed a complaint alleging defamation against the appellees, Ottaway Newspapers, Inc., publisher of "The Daily Independent" and "The Sunday Independent," papers circulated in and around Ashland and Boyd County. Also

[1]This case was circulated and concurred to prior to the death of Judge Howard.

named as a defendant was P. R.Bailey, a reporter for the newspapers. In November the remaining appellants, David Osborne and Kenco Associates, Inc., as well as Joseph Sisler, not a party to the appeal, filed their complaint against the same defendants, also alleging defamation arising from the same series of articles published in April, 1985, concerning the appellants and the Big Sandy Water District. The two actions were consolidated in 1986.

After two years, during which time much discovery was completed, the trial court entered an order determining that the appellants, David Osborne and his corporation, Kenco Associates, Inc., and Joseph Sisler were limited-purpose public figures. Appellant Hall was determined to be a "public official." All the plaintiffs were thus required to prove their claims under the malice standard set forth in New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964).

In September, 1989, the trial court granted the defendants' motion for summary judgement. The court found that the articles were substantially true and concluded that the evidence presented did not "give rise to malice by clear and convincing evidence or reckless disregard for the truth by clear and convincing evidence," that defendant's conduct did not establish a claim for outrageous conduct and that the evidence failed to "reveal any facts which constitute an invasion of privacy."

Since the dismissal of the appellants' claims, our Supreme Court has released significant opinions bearing on the propriety of the trial court's ruling. Specifically, had the trial court had benefit of Warford v. Lexington Herald-Leader Company, Ky., 789 S.W.2d 758 (1990), we believe the trial

court would not have concluded as it did.

The facts in this case are well known to the parties and we will be brief in our recitation of those facts necessary for an understanding of this opinion. The series of articles written by P. R. Bailey, a new employee with no background or education in journalism, was highly critical of Osborne and his company, Kenco Associates, Inc. Kenco was the consultant engineering firm used by Big Sandy. The general tenor of the articles can be discerned from the first two paragraphs of the first article in the series:

> During its brief existence, the Big Sandy Water District, created to bring clean, economical water service to rural Boyd County, has been a playground for engineers, a disappointment to customers, and an embarrassment to elected officals.
>
> Like dust under a drippy faucet, the integrity of the water district has been muddied with questions about its design, construction and financial management.

The series allegedly contained several inaccuracies regarding financial gain to Osborne and illegal activity by Osborne and his company in the placement of water lines. Hall, general counsel for Big Sandy, was allegedly defamed by the articles' implication that he and a commissioner, Salisbury, developed the water district to promote a residential subdivision in which both had an interest. The articles stated that Hall was a "partner" in Sandy Valley Development, Inc., a status Hall denies. The articles strongly imply that Hall gained economically at the expense of his client, Big Sandy, and that he used his client to benefit himself. The articles also incorrectly reported the amount of fees paid to Hall for his services by Big Sandy.

The first issue we will address is the trial court's ruling that Hall is a "public official." There is little law in Kentucky concerning who is a "public official" for purposes of applying the actual malice standard in order to recover from a media defendant.[2] The seminal case from the U.S. Supreme Court is Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S.Ct. 669, 676, 15 L.Ed.2d 597, 605 (1966), which held:

> [T]he "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs...Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standard applies. (Emphasis added).

In a footnote in Rosenblatt, the Supreme Court reiterated that the plaintiff's position "must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." Id., n. 13, 15 L.Ed.2d at 606. Further enlightenment in how the Supreme Court perceives "public officals" can be gleaned from Gertz v.

[2]In Tucker v. Kilgore, Ky., 388 S.W.2d 112 (1964), a patrolman was determined not to be a "public offial." The New York Times rule was held to apply to candidates for public office in Sparks v. Boone, Ky. App., 560 S.W.2d 236 (1977). In such cases as Ball v. E. W. Scripps Co., Ky., 801 S.W.2d 684 (1990), supra, the issue was not raised as the plaintiff, an elected official

(Commonwealth Attorney), was obviously a public official. Robert Welch, Inc., 418 U.S. 323, 344, 94 S.Ct. 2997, 41 L.Ed.2d 789, 808 (1974), in which public officials, like public figures, were said to "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." (Emphasis added).

In applying these standards to the appellant, Hall, it is our conclusion that the trial court erred as a matter of law in determining Hall to be a public official. Hall is not a government employee but an attorney in a private law firm who has a contract to do legal work for Big Sandy for an hourly fee. Hall is not employed by Big Sandy Water District on a full time basis. Appellees' reliance on Tunnell v. Edwardsville Intelligencer, Inc., 99 Ill. App.2d, 241 N.E.2d 28 (1968), is misplaced as the plaintiff was the city attorney. More importantly, there was no evidence that Hall has any "substantial responsibility" for or control over Big Sandy.[3] There is also no evidence that Hall enjoys "significantly greater access" to the media. The trial court found that by virtue of his attendance at the water district's meetings (where the local newspaper usually sends a representative), Hall had such access. The fallacy in this argument was discussed in the Warford case, supra, 789 S.W.2d at 771. Relying on Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), our highest court held as follows:

[3]Hall described his duties as attending monthly meetings of the commissioners of the water district, rendering advice, if asked, and handling any litigation involving the district. The only court appearances required concerned condemnation. His "main function" was to prepare easements and deeds from tracts of land where pumping stations are located.

> The fact that appellant received occasional press attention, or that one can reasonably speculate that if the local media decided to publish an article on some nationwide recruiting controversy, a reporter might ask appellant for his views does not imply that he could just as easily have insisted his views be published.

Finally in this regard, there is a dearth of evidence that, but for the articles that form the basis of this suit, there would be any interest by the public in Hall's qualifications or that he holds a position which invites "public scrutiny."

We also hold that the trial court erred as a matter of law in determining the remaining appellants to be public figures. The Warford opinion provides an exhaustive review of the law pertaining to public figures and there is no need for us to duplicate that effort here. In applying the analysis outlined in Warford, and assuming for purposes of argument that there was a "particular and identifiable public controversy," we must determine whether Osborne "by some voluntary act...assumed a role of public prominence, or was in a position to influence others...and enjoy[ed] regular and continuing access to the media." Id. at 766.

The question of media access is answered the same as for Hall. There is no evidence that Osborne or Kenco Associates had access to the media to present their side of the controversy or contradict false statements made about them. Furthermore, the record does not indicate that the engineers utilized the media to affect any particular result. That Kenco or Osborne have been mentioned in articles over the years does not, as the appellees suggest, constitute the type of "intense media attention" necessary for one to have assumed

the risk of defamation. Id. at 770 and 771.

Additionally we hold that the trial court erred in its determination that summary judgment was appropriate because the series was "substantially true." We recognize that some of the alleged defamatory material falls within this category. For example, the statement that Hall charged the water district a fee of $65 per hour when in fact he charged only $60 is clearly susceptible to the "substantial truth" approach. See Bell v. Courier-Journal and Louisville Times Company, Ky., 402 S.W.2d 84, 87 (1966), which holds that a newspaper "...is not to be held to the exact facts or to the most minute details of the transactions that it reports." However, the articles, considered in their entirety, contain more than just slight factual inaccuracies: they impute criminal activity and ethical misconduct to the appellants. There is, we hold, sufficient evidence of the falsity of the statements to allow the jury to decide the issue of whether the statements are true.

Finally, though our holding no longer requires the appellants to prove malice to establish liability of the appellees, such proof will be necessary on remand for appellants to prevail on their claim for punitive damages. We believe there to be considerable evidence of malice that may upon trial be sufficient to create a jury issue. Certainly the heavy reliance of the reporter on a former disgruntled employee of Osborne and an unhappy consumer of the water district, both sources obviously hostile to the appellants, provides evidence from which malice can be inferred. See Ball v. E. W. Scripps Co., Ky., 801 S.W.2d 884 (1990).

Accordingly, the judgment of the Boyd Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

HOWARD, JUDGE, CONCURS.

WILHOIT, JUDGE, CONCURS IN RESULT AND FILES A SEPARATE OPINION.

WILHOIT, JUDGE, CONCURRING. I concur in the result reached by the majority. Whether a jury question does or does not exist with respect to punitive damages depends upon the evidence adduced at trial, not what is before us now. In any event, I take these statements in the majority opinion to be no more than dictum.

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ATTORNEY FOR APPELLANT HALL:

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Ashland, KY

COMMONWEALTH OF KENTUCKY
BOYD CIRCUIT COURT
DIVISION I

Action No: 85-CI-718

ROGER W. HALL, et al., PLAINTIFFS
VS
OTTAWAY NEWSPAPERS, INC., et al., DEFENDANTS

AND
COMMONWEALTH OF KENTUCKY
BOYD CIRCUIT COURT
DIVSION I
Action No: 85-CI-840

DAVID OSBORNE, et al., PLAINTIFFS
VS
OTTAWAY NEWSPAPERS, INC., et al., DEFENDANTS

ORDER

This matter is before the Court on defendants' Motion for Summary Judgment. The defendants have asked the Court to rule that the plaintiffs are "public persons" and have also moved the Court for Summary Judgment, on the merits, as to each of the plaintiffs' specific claims, without regard to the status of the plaintiffs as either public or private persons.

The Court has considered the record to include the depositions, affidavits, and exhibits, the defendants' Motion for Summary Judgment, and Memorandum, the responses filed by the plaintiffs, and the defendants' reply thereto.

Furthermore, this Court has had the advantage of hearing arguments of counsel, in chambers, on March 25, 1988, in Paintsville.

Based on the foregoing, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Whether the plaintiffs are "public officials/public figures", or private persons, is a question of law which this Court must determine.

With regard to plaintiffs, David Osborne, Joseph Sisler, and Kenco Associates, Inc., the Court finds that Osborne is the sole stockholder and President of the corporate plaintiff, Kenco Associates, Inc. Sisler was employed by Osborne for 13-1/2 years and at the time of filing this action was Vice President of Engineering and Surveying. Both Osborne and Sisler are registered professional engineers. Kenco Associates, Inc., was employed as consulting engineers by the Big Sandy Water District.

By application of the analysis found in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) and McDowell v. Paiewonsky, 769 F.2d 942 (1985), I find that the plaintiff, David Osborne, his corporation Kenco Associates, Inc., and Joseph Sisler are, for the purposes of this action, "limited purpose public figures", or to use the term which I prefer, "public persons". I base this decision on the following facts: these plaintiffs had access to the effective channels of communication by virtue of the prior media coverage of the Big Sandy Water District project and other public works projects, they also had access to a public forum for rebuttal by virtue of their attendance at the public

meetings of the Big Sandy Water District, and the public meetings of other local governmental agencies; they were aware of the risk of media coverage when they undertook the position of consulting engineers for the Water District; they became spokesmen and advocates for the Water District and its Commissioners and as such have directly involved themselves in several "public controversies" during the life of the Water District.

THEREFORE, the plaintiffs, David Osborne, Joseph Sisler, and Kenco Associates, Inc., must prove that the publications alleged to be defamatory are false, and must prove by clear and convincing evidence that they were published with knowing falsehood or reckless disregard for the truth; this is the standard ennunciated by the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) and St. Avant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323 (1968).

With regard to the plaintiff, Roger Hall, I find that he is a "public official" as first defined in Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669 (1966), or to use the Court's preferred term a "public person".

I find the following facts with regard to the plaintiff, Roger Hall; he has been counsel to the Big Sandy Water District since its beginning, the parties agree as to his duties, which duties are clearly defined in the record, he admits that he exercised substantial discretion in the conduct of these duties; he received media coverage by virtue of his position as counsel to the Water District, and by virtue of his other, simultaneous, employment with other government agencies, therefore, he had access to the press and his constant attendance of the public meetings of the Water District

indicates that he had access to a public forum for rebuttal; the record indicates that he voluntarily accepted this position and was aware that it would receive media coverage; he admits that the alleged defamation concerns his performance of duties as counsel to the Water District. Therefore, as a matter of law, the plaintiff, Roger Hall, appeared to the public to have substantial control for the conduct of government affairs and is therefore a "public person" within the meaning of Rosenblatt v. Baer, supra.

Therefore, he must prove that the publications alleged to be defamatory are false, and he must prove by clear and convincing evidence that they were published with knowing falsehood or reckless disregard for the truth.

The remainder of the defendants' Motion for Summary Judgment is passed, pending the further Orders of the Court.

This case is continued generally for trial by jury pending the further Order of this Court.

The parties may now continue discovery, specifically, this Court's earlier rulings are amended to the extent that the plaintiffs may inquire into the "editorial process" of the defendants.

This the 4th day of April, 1988.

Stephen N. Frazier
Hon. Stephen Frazier
Special Judge,
Boyd Circuit Court

I hereby certify that a true and correct copy of the

foregoing Order has been served upon the following named by the mailing of the same, postage pre-paid, to:

1. Hon. J. Stewart Schneider
   2609 Louisa Street
   Catlettsburg, KY 41129

2. Hon.. Gregory Monge
   P .O. Box 1111
   Ashland, KY 41105-1111

3. Hon. Ernest M. Pitt, Jr.
   P. O. Box 1239
   Ashland, KY 41105-1239

this 6 day of April, 1988

RUSSELL E. COMPTON, BOYD CIRCUT CLERK

By: Rita Bloebaum

BOYD CIRCUIT COURT
C.A. NO. 85-CI-718

ROGER W. HALL,	PLAINTIFF,
-versus-	
OTTAWAY NEWSPAPERS, INC., d/b/a ASHLAND PUBLISHING COMPANY, AND P. R. BAILEY,	DEFENDANTS

BOYD CIRCUIT COURT
C.A. NO. 85-CI-840

DAVID OSBORNE, JOSEPH SISLER AND KENCO ASSOCIATES, INC.,	PLAINTIFFS,
-versus-	
OTTAWAY NEWSPAPERS, INC., d/b/a ASHLAND PUBLISHING COMPANY, AND P. R. BAILEY,	DEFENDANTS.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

THE above styled actions are before the Court on the defendants' renewed Motion for Summary Judgment. The parties have filed briefs and orally argued to their Court their respective postions.

FINDINGS OF FACT

THE Daily Independent, a newspaper of general circulation published in Ashland, Kentucky from December, 1984 until April, 1985, published a series of articles of which the plaintiffs complain.

A great deal of the information in the series was obtained from public records and interviews and concerned the history of the Big Sandy Water District as well as its proposed then current operations.

On April 6, 1988, the Court ruled that under the facts of this case the plaintiffs were "public persons".

The claim of Roger Hall also includes a claim of outrageous conduct.

The plaintiffs have raised numerous claims and causes in this action and strongly asserts the issues must be determined by a Jury.

After review of the evidence, the pleadings, motions and arguments, the Court finds otherwise.

The statements complained of by David Osborne, Kenco Associates, Inc. and Joseph Sisler are:

1) The Big Sandy Water District "has been a playground for engineers";
2) The extra-territorial water line extensions were "illegal";
3) The property of David Osborne "benefits from lines";
4) "There was a rush to serve the development";

5) The Public Service Commission uncovered "evidence of conscience wrongdoing on the part of Kenco Associates"; and

The statements complained of by Roger Hall are:

1) Roger Hall was a "partner" in Sandy Valley Development, Inc.;
2) Roger Hall was "involved in the creation" of the Big Sandy Water District;
3) Roger Hall's hourly rate as an attorney was "$65.00" per hour;
4) Roger Hall "developed and promoted" Sandy Valley Development, Inc.; and
5) Roger Hall failed to return several telephone calls made to him by The Daily Independent.

These statements and other similar recitations, found in the articles, were their subjects of the litigation. The Court finds some scintilla of fact in the evidence for all of the statements sufficient to conclude The Daily Independent did comply with the standard of "substantial truth" in its publications in question.

CONCLUSIONS OF LAW

1) The proof does not contain material disputes of fact.
2) Public figures must present clear and convincing evidence of publication of defamatory material with malice, or publication of defamatory material with reckless disregard for the truth, New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964).
3) The evidence presented in this case does not, as a matter of law, give rise to malice by clear and convincing

evidence or reckless disregard for the truth by clear and convincing evidence.

4) The conduct of the defendants, as shown by the evidence does not give rise to a claim of action for outrageous conduct in that the conduct is not extreme and outrageous.

5) The evidence does not reveal any facts which constitute an invasion of privacy by the defendants.

JUDGMENT

THE Court herein determines that plaintiffs are public persons, and they failed to present proof sufficient to show malice by clear, convincing evidence or reckless disregard for the truth on the part of the defendants, invasion of privacy, the tort of outrageous conduct, and any other cause of action against the defendants. The evidence does not show dispute as to any material fact and therefore in view of both of these findings, the defendants are entitled to Summary Judgement as a matter of law.

THEREFORE, IT IS THE ORDER AND JUDGMENT OF THE COURT Defendants are herein granted SUMMARY JUDGMENT with the Complaints filed against them DISMISSED with costs to the plaintiffs.

THIS is a final and appealable order and there is no just cause for delay of entry.

DATED this the 21st day of September, 1989.

Stephen N. Frazier
HON. STEPHEN N. FRAZIER
SPECIAL JUDGE
BOYD CIRCUIT COURT

CERTIFICATION:

I hereby certify that I have mailed a true copy of the foregoing Order to all attorneys of record, this the 25th day of September, 1989.

CLERK, BOYD CIRCUIT COURT
BY: Connie Wooten, D.C.

Commonwealth of Kentucky
Court of Appeals

NO. 89-CA-2228-MR

DAVID OSBORNE, KENCO
ASSOCIATES, INC.,
AND ROGER HALL — APPELLANTS

V.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE STEPHEN FRAZIER, JUDGE
ACTION NO. 85-CI-718

OTTAWAY NEWSPAPERS, INC., d/b/a
ASHLAND PUBLISHING COMPANY,
and P. R. BAILEY — APPELLEES

ORDER DENYING PETITION FOR REHEARING

BEFORE: McDONALD, MILLER, and WILHOIT,
JUDGES.

The Court having considered the Petiton for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: SEPTEMBER 20, 1991

John D. Miller
JUDGE, COURT OF APPEALS

Supreme Court of Kentucky

91-SC-847-D
(89-CA-2228-MR)

OTTAWAY NEWSPAPERS, INC., ET AL. — MOVANTS

V.

BOYD CIRCUIT COURT
85-CI-718

DAVID OSBORNE, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED February 5, 1992.

Robert F. Stephens
Chief Justice